

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

MOUNTAIN VALLEY PIPELINE, L.L.C.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 2:17-cv-4214
)	
AN EASEMENT TO CONSTRUCT,)	
OPERATE AND MAINTAIN A 42-INCH)	
GAS TRANSMISSION LINE ACROSS)	
PROPERTIES IN THE COUNTIES OF)	
NICHOLAS, GREENBRIER, MONROE,)	
SUMMERS, BRAXTON, HARRISON,)	
LEWIS, WEBSTER, AND WETZEL, WEST)	
VIRGINIA, et al.,)	
)	
Defendants.)	

**LANDOWNERS' REPLY TO PLAINTIFF MOUNTAIN VALLEY PIPELINE, LLC'S
RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION OF AND/OR
CLARIFICATION OF THE COURT'S DECEMBER 15, 2017 ORDER**

Defendants Orus Ashby Berkley, Reinhard Bouman, Ashofteh Bouman, Tammy Capaldo, Robert M. Jarrell, Allen Walter Lehr, Jeffrey D. Osborne, Kiranasa Swami, Ronald Tobey, and Elizabeth Tobey (collectively, "Landowners"), by counsel, hereby respectfully submit this reply to Plaintiff's response to their motion for reconsideration of and/or clarification of the Court's December 15, 2017 Order (ECF # 109) (hereinafter "Discovery/Briefing Order.")

In large part, Plaintiff relies on its voluntary production of documents to justify its opposition to reconsideration and/or clarification of the Discovery/Briefing Order. That voluntary production consists of 10,001 separate image files uploaded to an FTP site on or before December 12, 2017. Although Plaintiff represents that it "continues to produce relevant documents as those documents become available," ECF # 124 at 2, Plaintiff has not uploaded

any new documents to the FTP site since December 12, 2017.¹ Moreover, Plaintiff has withheld an unknown number of documents based on claims of confidentiality pending a ruling on a joint motion for a protective order (ECF # 115).

Plaintiff's voluntary provision of documents is not a sufficient substitute for complete discovery before briefing for several reasons. On the question of whether the easements sought to be condemned conform to the FERC-approved route, Plaintiff provided more than 800 pages of maps, in the form of image files. Those maps appear to depict the entire 303-mile long pipeline route as submitted to the Federal Energy Regulatory Commission ("FERC") in October 2016, but have been produced in such a way that it is unduly burdensome for Landowners to identify which of the more than 800 files reflect the FERC-approved route across their properties. The map files are not indexed by landowner or by any other metric. Plaintiff's provision of maps to date does not comply with the rules of discovery, in that the electronically stored information has not been provided in a reasonably usable form and amounts to an impermissible document dump. *See Scott Hutchison Enterprises, Inc. v. Cranberry Pipeline Corp.*, 318 F.R.D. 44, 54 (S.D. W. Va. 2016) (holding sanctions appropriate for a document dump which "can bury relevant evidence and force the receiving party to expend considerable time and expense parsing through documents in order to glean information which may be relevant"). *See also Calkins v. Pacel Corp.*, Civ. No. 3:07-cv-00025, 2008 WL 2311565 at *4 (W.D. Va. June 4, 2008); *John W. Daniel & Co., Inc. v. Durham Public Schools Bd. of Educ.*, Civ. No. 1:07-CV-61, 2008 WL 2781164 at *1 (M.D.N.C. Mar. 7, 2008); *Cleveland*

¹ As Landowners were preparing to file this Reply brief, their counsel received notification that Plaintiff's counsel had uploaded two additional folders to the FTP site. From their titles, those folders appear to include versions of the originally provided documents in "portable document format," or "PDF." Accordingly, the information uploaded on December 21, 2017, appears to be the same information uploaded on or before December 12, 2017, just in a different file format.

Construction, Inc. v. Gilbane Building Co., Civ. No. 05-471-KSF, 2006 WL 2167238 at *5–*6 (E.D. Ky. July 31, 2006); *U.S. S.E.C. v. Elfindepan, S.A.*, 206 F.R.D. 574, 577 (M.D.N.C. 2002). In this compressed discovery period, Landowners lack sufficient time to review the more than 800 pages of files to determine which pages depict their properties and whether the route depicted was actually approved by FERC. Accordingly, the files that Plaintiff has voluntarily provided to date are insufficient to allow Landowners to fully respond to the motion for partial summary judgment.

With regard to the issue of Plaintiff's financial capabilities, Plaintiff has only provided one nine-page, undated document on its FTP site on that topic. That document appears to be a submission to FERC in which Plaintiff states that it will need approximately \$2.0 billion in equity "furnished by the members of Mountain Valley" and will need to borrow an additional \$1.3 billion from undetermined sources to build the pipeline. The document provided includes no evidence that Plaintiff's members are contractually bound in any way to provide the required equity nor any evidence that Plaintiff has successfully borrowed or received commitments for the \$1.3 billion in debt financing. In short, the information that Plaintiff has voluntarily provided is woefully inadequate to address the question of Plaintiff's financial capabilities and further document production is necessary before briefing on summary judgment is required.

With regard to the status of Plaintiff's satisfaction of the conditions in its FERC Certificate, the documents that Plaintiff voluntarily provided on its FTP site only identify whether particular conditions are satisfied or remain pending; those documents do not provide information as to whether or when Plaintiff will satisfy outstanding conditions. Accordingly, further discovery is necessary on this topic as well before summary judgment briefing.

With regard to the topic of the appropriate bond amount should a preliminary mandatory

injunction issue, Plaintiff voluntarily provided more than 6,800 images of documents related to easements that Plaintiff has obtained through contract, but not a single document related to Plaintiff's estimates of the value of the easements to be condemned. Accordingly, further discovery is necessary on this topic before a bond can be set.

Finally, with regard to the topic of Plaintiff's claimed irreparable harm, Plaintiff voluntarily provided precedent agreements between it and shippers who will use the pipeline if it is completed. Those agreements appear to be those that Plaintiff's declarant—Robert J. Cooper—refers to in Paragraph 26 of his declaration in support of Plaintiff's motion for immediate possession. ECF # 6-1 at ¶ 26. Landowners interpret those agreements to undermine Plaintiff's claims of irreparable harm based on Plaintiff's asserted need to place the pipeline in service in 2018. Plaintiff has not provided any documents to support their claims of "contractual requirements to begin clearing activities in February 2018." ECF # 6-1 at ¶ 25. Accordingly, the documents provided to date are not sufficient to allow Landowners to fully respond to Plaintiff's motion for a preliminary mandatory injunction.

In short, Plaintiff overstates the sufficiency of the documents that it has voluntarily provided to date. Those documents are not an adequate substitute for discovery on the five topics requested by Landowners. For that reason, and the reasons set out in Landowners' Motion for Reconsideration of and/or Clarification of the Court's December 15, 2017 Order, Landowners respectfully request that the Court reconsider the briefing schedule on Plaintiff's Motion for Partial Summary Judgment and Immediate Access to and Possession of the Easements for Construction of MVP Project (ECF # 6), and/or clarify the existing schedule set forth in the Discovery/Briefing Order.

Respectfully submitted,

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Certificate of Service

I hereby certify that, on December 21, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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